No. 80-1858

Office-Supreme Court, U.S.
FILED
AUG 14 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF PENN YAN, NEW YORK, and MUNICIPAL ELECTRIC UTILITIES ASSOCIATION OF NEW YORK STATE,

Petitioners,

—v.—

NEW YORK STATE ELECTRIC & GAS CORPORATION, and FEDERAL ENERGY REGULATORY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT NEW YORK STATE ELECTRIC & GAS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 1981

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission can compel involuntary wheeling of electric power by modifying Respondent utility's contract without a hearing under Section 206 of the Federal Power Act where questions related to the public interest were in issue, and without complying with the statutory prerequisites of Sections 211 and 212 of that Act.

The court below held that where, as in this case, a contractual modification declared by the Federal Energy Regulatory Commission (FERC) amounts to an order requiring wheeling,

it must be preceded by a hearing under Section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e, and by determinations in accordance with the requirements of Sections 211 and 212 of the FPA, 16 U.S.C. § 824j and k. Petition at 34b.[1]

COUNTERSTATEMENT OF THE CASE

The opinion of the court below contains an accurate statement of the factual background of the case, including the proceeding before FERC. Petition at 3b-11b.

Contrary to Petitioners' statements, Petition at 5 and 8, no extensive presentations were made before FERC in this case. The parties before FERC barely completed initial pleadings when that commission, *sua sponte,* issued its declaratory order modifying wheeling contracts of Respondent New York State Electric & Gas Corporation (NYSEG). In fact, NYSEG's petition to intervene before FERC was not even granted until the issuance of the FERC order denying rehearing of its initial order. Petition at 9e.

FERC's summary action denied NYSEG due process by failing to afford it a hearing to substantiate its position that the challenged provisions in its wheeling contracts are in the public interest. The court below agreed with NYSEG that material issues of fact were in dispute and that FERC should have conducted a hearing respecting NYSEG's contracts under Section 206 of the FPA, 16 U.S.C. § 824e(a). Petition at 25b-27b[2].

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1 Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed by Village of Penn Yan, New York and Municipal Electric Utilities Association of New York State, Petitioners. The opinion of the Court of Appeals is officially reported at 638 F.2d 388, and it is reprinted in appendix B to the Petition. The term "wheeling" as applied to this case is defined in the opinion below. Petition at 9b, n.4.

2 While Petitioners suggest that the court below ordered a Section 206 hearing only with respect to one of the contracts, Petition at 7-8, a plain reading of the court's opinion shows that a Section 206 hearing must be held respecting both contracts at issue. Petition at 24b-27b; 33b-34b.

The court below also found that FERC's declaratory order modifying NYSEG's contract with the Power Authority of the State of New York (PASNY) in effect compelled wheeling by NYSEG. Petition at 29b. The court rejected FERC's contention that under NYSEG's contract with PASNY, known as Contract NS-11, it was dealing with resale limitations, rather than wheeling. It also rejected FERC's rationalization that instead of compelling wheeling, FERC was merely removing restrictions on the use of wheeled power. Petition at 27b-29b. Petitoners concede that the FERC order in fact compelled wheeling by NYSEG, but urge that Sections 205 and 206 of the FPA, 16 U.S.C. § 824d and e, permit FERC to expand wheeling obligations.

All petitions for rehearing, with suggestions for rehearing *en banc*, having been denied by the court below, this case is ripe for an evidentiary hearing before FERC to examine the public and private interests sought to be protected in this instance.

SUMMARY OF REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The question presented may become moot in this case. There is no significant question of law presented which justifies the granting of the Petition.[3] The decision below is in full accordance with the decisions of this Court and of the Circuit Courts of Appeal. FERC clearly has no authority to compel wheeling except pursuant to Sections 211 and 212 of the FPA.

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3 FERC itself (through the Acting Solicitor General) in a Memorandum in Opposition has opposed the issuance by this Court of a writ of certiorari.

REASONS FOR DENYING THE PETITION

1. The Question Presented Is Not Ripe for Review by this Court.

The court below determined that the summary disposition of this case by FERC was erroneous, in part because the record revealed to the court material questions relating to the public interest in NYSEG's contracts which should have been considered at a public hearing under Section 206 of the FPA. Petition at 25b-27b. In this case no hearing was held, FERC viewing one as unnecessary because of NYSEG's admission that it preferred not to supply transmission facilities to a competitor.[4] The court properly pointed out that there was no reason for FERC to assume that NYSEG's self-interest is inherently inconsistent with the public interest. Petition at 25b-26b. It correctly concluded that the probable impact of the proposed modification on NYSEG, possible inefficiency in duplicating service and the extent to which NYSEG might be entitled to a contractual "settlement", could not be decided by FERC without a hearing. Petition at 26b-27b.[5]

Thus, under the court's decision a hearing must be held under Section 206. If as a result of that hearing FERC determines that the challenged contractual restriction is in the public interest, then the matter ends there, and the necessity for proceeding further under the provisions of Sections 211 and 212 of the FPA would become moot. Any question concerning the extent of FERC authority to order wheeling

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4 In addition to NYSEG's claim that it was denied due process, FERC also denied PASNY its right to participate in the proceeding if FERC decided to consider the petition before it. Petition at 9b, n.5; 27b.

5 *See generally Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1390 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 286 (1981), where the Fifth Circuit held that concern with duplication of telephone service and facilities resulting in inefficient service presents a possible ground for a legitimate refusal to interconnect telephone systems in the public interest, which required a hearing to determine the reasonableness of AT&T's refusal to interconnect with Mid-Texas.

subsequent to the enactment of Sections 211 and 212 is, therefore, premature.

2. The Question Presented Lacks Sufficient Significance for Review by this Court.

Petitioners grossly exaggerate the impact of the decision below on FERC's ability to regulate electric utilities properly under Sections 205 and 206 of the FPA. They also mischaracterize the facts of this case and the relevant holding below in an obvious effort to bolster their overstatement of the significance of this case involving electric service to about 30 residential customers. Petition at 4.

Contrary to Petitioners' assertions, the court below specifically affirmed FERC's authority to modify nearly all terms and conditions of wheeling contracts pursuant to the authority granted it under Section 206 of the FPA. The decision states as follows:

> Nor do we suggest that the Commission is powerless to review a wheeling agreement under § 206 without following the requirements of §§ 211 and 212. *If, after a hearing as required by § 206, the Commission determines that a particular rate, charge, or condition is unreasonable, it can order a modification.* But where, as here, the modification amounts to an order requiring wheeling, it must be preceded also by determinations in accordance with §§ 211 and 212. Petition at 34b (emphasis added).

As the court pointed out, FERC can ordinarily nullify a particular wheeling rate, charge or condition if it determines it unreasonable after a hearing under Section 206. On the other hand, the decision preserves the traditional voluntariness of wheeling arrangements by properly interpreting FERC's limited authority to compel wheeling pursuant to Sections 211 and 212. Petitioners' argument concerning the alleged impact of this case on FERC authority under Sections 205 and 206 is insupportable.

Prior to the enactment of Sections 211 and 212, FERC had no authority whatsoever to compel wheeling. *Otter Tail Power Co. v. United States,* 410 U.S. 366, 375-76 (1973). The decision below simply reflects the state of the law relative to wheeling subsequent to the decision of this Court in *Otter Tail, supra.* The Second Circuit's narrow holding respecting wheeling does not deprive FERC of any authority granted it under the FPA.

The lack of significance of this case is underscored by the fact that not one comparable case has been cited by Petitioners. Nor are we aware of any court decision which conflicts with the ruling of the court below. Petitioners' parochial interests aside, the significance of the Second Circuit's decision lies in its affirmation of FERC's jurisdiction to modify the wheeling contract to which PASNY is a party, and FERC's responsibility to consider antitrust policy in appropriate circumstances. Petition at 12b; 23b. Furthermore, FERC's authority to modify other forms of transmission contracts without complying with Sections 211 and 212 is not in question. This case simply involves the enlargement of a wheeling obligation (which obligations have traditionally been left to voluntary arrangements) without affording the parties a hearing under Section 206 of the FPA under the circumstances and without complying with Sections 211 and 212. Petitioners' claims concerning the impact of the decision do not warrant the granting of their Petition.

The ultimate relief sought by Petitioners would seriously undermine Congressional intent as well as this Court's holding in *Otter Tail, supra* relative to FERC authority over wheeling. If permitted to stand, the FERC order modifying NYSEG's contracts would have effected an unprecedented and unwarranted enlargement of a voluntary, limited wheeling obligation in direct conflict with settled case law and the intent of Congress. This Court should not grant the Petition because the question presented does not warrant further consideration.

3. The Decision Below Is in Full Accordance with Judicial Precedent and the Intent of Congress.

As discussed *supra* at 5-6, the decision below preserves FERC's full regulatory authority over transmission contracts under the FPA and affirms FERC's responsibility to consider antitrust policy in appropriate circumstances. As for wheeling, the Court of Appeals properly determined the extent of FERC's authority to modify such voluntary contracts. Its decision is in accordance with this Court's determination in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 375-76 (1973), and it is consistent with the decisions in *Central Iowa Power Cooperative v. FERC*, 606 F.2d 1156, 1169 (D.C. Cir. 1979), *Sunflower Electric Cooperative, Inc. v. Kansas Power and Light Co.*, 603 F.2d 791, 798-800 (10th Cir. 1979), and *Richmond Power & Light v. FERC*, 574 F.2d 610, 619-20 (D.C. Cir. 1978), the only other Circuit Court of Appeals decisions found which considered the question of FERC's authority to compel wheeling.

There is no substance whatsoever to the suggestion by Petitioners that FERC has previously compelled wheeling by modifying voluntary and limited contractual wheeling terms. It should also be noted that FERC never found the challenged provisions in NYSEG's contracts to be discriminatory, and, therefore, FERC's power to correct discriminatory provisions in contracts was not in issue below. The gravamen of the complaint about NYSEG's contracts was that they were anti-competitive in effect *per se*. *See* Petition at 1d; 1e. The Second Circuit properly rejected FERC's summary conclusion on the issue presented.

Petitioners claim that the decision in *Otter Tail, supra* supports their position. Petition at 16. Their misplaced reliance on that case is surprising. In *Otter Tail, supra*, this Court extensively reviewed the legislative history of the FPA relative to wheeling and flatly concluded:

> So far as wheeling is concerned, there is no authority granted the Commission [FERC] under Part II of the

> Federal Power Act to order it, for the bills originally introduced contained common carrier provisions which were deleted. The Act as passed contained only the interconnection provision set forth in § 202(b). The common carrier provision in the original bill and the power to direct wheeling were left to the "voluntary coordination of electric facilities." 410 U.S. at 375-76 (footnotes omitted).

The Petition utterly fails to address such conclusion of this Court. Instead it advocates an unfounded claim concerning wheeling based upon the effect of a judicial decree under the antitrust laws and upon a footnote taken out of context from the dissenting portion of the "separate opinion" in that case, referred to in the Petition at 16, n.8. Neither the decree nor Petitioners' convenient deployment of the footnote provide any basis upon which to ignore the relevant holding in *Otter Tail, supra*. Besides, Petitioners' references suggest no more than the fact that FERC has jurisdiction to regulate voluntary wheeling agreements to the extent to which the utility has volunteered to wheel or to which a court has ordered the utility to wheel. There is nothing in this which is inconsistent with the decision below.

Petitioners' argument rests solely upon the transparent allegation that somehow FERC had authority to compel wheeling prior to enactment of Sections 211 and 212 of the FPA. Their repetitive assertion that the decision "emasculates" pre-existing FERC authority to compel wheeling simply begs the question repetitively. Petitioners cite neither case law nor legislative history demonstrating that FERC may compel enlargement of a wheeling obligation without compliance with Sections 211 and 212. Their argument flies in the face of *Otter Tail, supra* and Congressional intent.

Petitioners contend at page 16 of their Petition that the decision in *Richmond Power & Light Co. v. FERC*, 574 F.2d 610 (D.C. Cir. 1978), supports their argument; however, the court there rejected an argument similar to the one pressed

here by Petitioners. That court refused to permit the indirect ordering of wheeling by FERC in view of the Congressional call for voluntary arrangements in this area. *Richmond, supra* at 620. Petitioners' reliance on *dicta* from *Richmond, supra* is uncompelling. That court stated, with reference to allegations of discrimination, as follows:

> [T]he Commission correctly ruled that since Congress made wheeling voluntary an individual decision to wheel for one customer but not for another is not automatically discriminatory. This rejection of a per se rule follows logically from the congressional refusal to impose common-carrier duties on electric utilities. 574 F.2d at 623 (footnotes omitted).

See also Sunflower Electric Cooperative, Inc. v. Kansas Power and Light Co., 603 F.2d 791, 799-800 (10th Cir. 1979). Moreover, as noted previously, FERC made no finding in this case that NYSEG's wheeling contracts are discriminatory. *See* Petition at 1d; 1e. Thus, there is no conflict between the decision in *Richmond, supra* and the decision below.

Petitioners' reference to an unpersuasive excerpt of the views of a FERC witness, who was testifying before a Congressional committee relative to draft legislation, is hardly indicative of Congressional intent. Petition at 10. Similarly, their excerpt of remarks by Senator Metzenbaum does not support the Petition. His quoted statement, Petition at 10, was taken out of context, and it was not directed solely to the subject of FERC authority over wheeling. Petitioners have conveniently omitted the following paragraph from the Senator's statement, which immediately follows and clarifies the meaning of the excerpt quoted by Petitioners:

> Thus, a party which has been denied wheeling services for anticompetitive reasons will not be hindered by this legislation from proceeding in the Federal courts or elsewhere. Likewise, the authority of the [Nuclear Regulatory Commission] in conducting an antitrust review under the provisions of the Atomic Energy Act of 1954, as

> amended, would not be affected by this extremely limited wheeling authority granted to FERC under this new legislation. These two agencies are charged with different responsibilities with respect to wheeling. [FERC's] new authority is condition[ed] on conservation, efficiency, reliability, and public interest. NRC's authority relates to correcting or preventing a situation inconsistent with the antitrust laws. 124 Cong. Rec. 17802 (daily ed. Oct. 9, 1978).

The Senator gave no indication that FERC had any "pre-existing" authority to compel wheeling. In fact, his reference to Sections 211 and 212 as "new" and "extremely limited wheeling authority granted to FERC" confirms that, prior to enactment of those provisions, FERC had no authority to compel a utility to wheel. We submit that had Congress intended Petitioners' viewpoint, it would have been incumbant upon it to speak to the question and overturn this Court's holding in *Otter Tail, supra.* Instead, however, Congress enacted Sections 211 and 212.

The court below correctly construed the relevant intent of Congress when it enacted Sections 211 and 212 of the FPA. *See* Petition at 29b-33b. While FERC could seek, after a hearing, to enjoin performance of a wheeling contract which did not comport with its view of the public interest and statutory requirements under Sections 205 and 206, *see* FPA Section 314, 16 U.S.C. § 825m, to compel wheeling by modifying a voluntary contractual commitment is qualitatively a different power and one denied FERC until the enactment of Sections 211 and 212 of the FPA. The court below understood the line drawn by Congress and this Court, and its decision reflects that.

All of the other authorities relied upon by Petitioners are inapposite and readily distinguishable. For instance, in *Central Iowa Power Cooperative v. FERC,* 606 F.2d 1156 (D.C. Cir. 1979), cited at page 17 of the Petition, FERC refused to modify a challenged power pooling agreement relative to the subject of wheeling, and the Court of Appeals for the District

of Columbia Circuit, relying on its prior decision in *Richmond, supra,* upheld FERC's position that FERC had no authority to compel wheeling. *Id.* at 1169. The primary issue in *Central Iowa, supra* dealt with membership provisions in the proposed agreement which were determined to be unreasonable after a Section 206 hearing. In addition, the opinion in *Central Iowa* clearly reflects that court's understanding that FERC had only limited powers to affect a voluntary power pooling agreement. *Id.* at 1168. Finally, it appears that FERC did not compel the filing and implementation of a modified power pooling agreement in *Central Iowa,* as FERC attempted to do respecting NYSEG's wheeling contracts. The decision in *Central Iowa* simply does not support Petitioners' argument. On the contrary, it is totally consistent with the decision below.

Similarly, the decision in *Municipalities of Groton v. FERC,* 587 F.2d 1296 (D.C. Cir. 1978), also cited at page 17 of the Petition, is irrelevant to the question presented. In *Groton, supra,* the court held that FERC had jurisdiction over a certain type of transmission rate known as a "deficiency charge" and that FERC could modify that charge in the public interest. *Groton, supra* at 1301-03. The decision in *Groton, supra* has nothing to do with FERC authority to compel wheeling. Furthermore, as previously noted, the decision below affirms FERC jurisdiction to modify rates and charges for wheeling service. Petition at 34b. It is thus in full accord with the decision in *Groton, supra.*

Petitioners' extensive reliance on a series of railroad cases to support its Petition is completely unavailing. All of these cases are based upon the fundamental principle that railroads are by statute common carriers. *See Richmond, supra,* 574 F.2d at 623, n.59. By contrast, as this Court has observed, Congress specifically deleted common carrier provisions when it passed the FPA. *Otter Tail, supra,* 410 U.S. at 375-76. While many of the provisions of the FPA may have been based upon the Interstate Commerce Act, 49 U.S.C. § 1 *et seq.,* as alleged in the Petition, Congress has determined that electric utilities are to be left to voluntary commitments in such areas as wheeling

except when Sections 211 and 212 are invoked. Unlike railroads, electric utilities are not common carriers, and they may limit their obligations to wheel, subject now to modification and compulsion by FERC under Sections 211 and 212 of the FPA.

This Court recently declined to permit the Federal Communications Commission to extend its jurisdiction to issue regulations which, in effect, would have made certain communications entities "common carriers" in direct conflict with Congressional intent that they remain free of governmental compulsion in certain areas. *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-09 (1979). In the face of a similar expression of Congressional intent, that electric utilities are not to be treated as common carriers respecting wheeling, this Court should decline to review the decision below. The Court of Appeals for the Second Circuit properly found that a hearing under Section 206 of the FPA should have been held in this instance, and it correctly interpreted FERC's new and extremely limited authority to compel wheeling under the FPA.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

August 1981

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